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Supreme Court of the United States

OCTOBER TERM, 1935

MANHATTAN GENERAL EQUIPMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 226

COLLIER SERVICE CORPORATION,
formerly BROADWAY SUBWAY ADVERTISING CO., INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 227

PETITION FOR REHEARING

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The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now MANHATTAN GENERAL EQUIPMENT COMPANY and COLLIER SERVICE CORPORATION, the petitioners in the above-entitled causes, by their counsel, and respectfully present this petition for a rehearing of the points discussed in the opinion handed down in said causes on February 3, 1936, and state the following reasons in support thereof:

I.

Your petitioners respectfully say that the original form of Article 1599, Subdivision 2, of Treasury Regulation 69, as promulgated on August 28, 1926, furnishes the applicable

rule for determining the loss suffered on the sale of 4,964 shares of stock of Artemas Ward, Inc. (N. Y.).

These 4,964 shares of Artemas Ward, Inc. (N. Y.) were not obtained in a tax-free reorganization, but were the original shares purchased by petitioners in 1925.* Their basis for tax purposes is determined by the generic rule of Section 204(a), that the basis for gain or loss from the sale of property is at cost, except in so far as otherwise provided in the succeeding subdivisions of that section. None of the succeeding subdivisions provides any basis to be used upon the disposition of the old shares of stock of Artemas Ward, Inc. (N. Y.), for the subdivision—Section 204(a) (9)—upon which the Commissioner has relied as creating an exception to the rule of Section 204(a) reads:

> *"If the property consists of stock or securities distributed after December 31, 1923, to a taxpayer in connection with a transaction described in subdivision (c) of section 203,* the basis in the case of the stock in respect of which the distribution was made shall be apportioned, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, between such stock and the stock or securities distributed; * * *."

The shares of Artemas Ward, Inc. (N. Y.) disposed of by the petitioner in the case at bar were acquired by *purchase* and not in connection with a transaction described in subdivision (c) of Section 203. The provisions of Section 204(a) (9) are, therefore, inapplicable to these shares, since the statute prescribes an apportionment of the basis between the old and the new stock *only* if the property sold consists of stock or securities acquired in connection with a tax-free reorganization. There are no *casus omissi* in Section 204(a). If no exceptions to it cover the transaction, *ex hypothesi* the general rule of Section 204(a) will govern.

The petitioners concede that because of the receipt of the new shares of stock, altering the nature of the investment from shares of Artemas Ward, Inc. (N. Y.) to shares in both

* The 100 shares of Artemas Ward, Inc. (Delaware) acquired in the reorganization were retained by the petitioner.

the New York and Delaware corporations, some abatement had to be made in the basis of cost for the old shares, and part of such cost allocated to the new shares. Otherwise, if the old stock were, as was here the case, sold first, no portion of the investment cost would have been attributed to the new shares, and when the new shares were subsequently sold they would have a basis of zero, despite the fact that Section 204(a) (9) expressly provides that upon the sale of the new shares they should be given a basis derived by apportionment of the cost. Thus, two utterly diverse and unrelated methods for determining gain or loss would be employed, depending on whether the new or the old shares of stock were first sold.

Mindful of the restrictions upon his authority to deviate from the basis provided for the old shares in Section 204(a), and in order to reconcile this section with Section 204(a) (9) by means of a uniform method for determining the basis of the new or old stock irrespective of which were first sold, the Commissioner, in his promulgation of Article 1599 of Treasury Regulations 69 in its original form, set the maximum of the cost to be attributed to the basis of the new shares at their fair market value at the time of distribution, reserving the balance of the cost to the old shares.

It cannot be gainsaid that this method harmonized the rules prescribed by Sections 204(a) and 204(a) (9) and effectuated the intention of Congress that Section 204(a) and its subdivisions be construed as an integrated system for the determination of bases.

Petitioners submit that the Commissioner was without statutory warrant in departing from his original cost-basis of the old stock, for no regulation would be consistent with Section 204(a) which failed to limit to the market value of the new stock the deduction from the basis of the old stock.* At least in so far as the basis of the old stock was concerned, a reduction of its basis by a greater amount would have been tantamount to an abandonment of the rule laid down by

* It is submitted that the reduction of the basis of cost under Section 204(a) by an amount greater than the fair market value of the new shares would have been objectionable as unreal and at variance with a business man's expectations.

Congress in Section 204(a). And as was said by Mr. Justice Sutherland in the instant case:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Co.*, 265 U. S. 315, 320-322; *Miller* v. *United States*, 294 U. S. 435, 439-440, and cases cited."

Because of the catastrophic decline in the value of the original shares prior to the reorganization, any method of apportioning the cost between the old and the new shares would yield a basis for the old shares which, at first sight, might appear unduly large. This, however, is merely a natural result of the existence of a loss unrealized at the time of the reorganization, and could only be avoided by assigning a greatly inflated basis to the new shares.

II.

The Commissioner in assailing the validity of his own regulations should be in no better position than a taxpayer. *Cf. Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375.

Article 1599 of Treasury Regulations 69, as originally promulgated, was intended to prevent the utilization by the distributee of a basis for his new stock greater than the fair market value at the time of acquisition. That reconsideration after all the returns were in revealed that a disproportionate basis for old shares might result if their market value had declined before reorganization, is not probative of the unreasonableness of the limiting sentence of Article 1599 of Regulations 69, which provided:

> "The portion of the cost or other basis of the old shares of stock to be attributed to the shares of new stock shall in no case exceed the fair market value of such shares as of the time of their distribution."

In view of the Congressional direction in Section 204(a) (9) that the Commissioner promulgate regulations, it would have been in contravention of the legislative purpose to postpone their issuance beyond a reasonable time, particularly as their effect would be to endow the section with meaning. It is clear that the regulations were to be issued before the close of the calendar year, and to that extent to be prospective in operation. Regulations whose issuance is delayed until after the expiration of the taxable year or which are amended several years later, are subject to being impugned as self-serving declarations made *post litem motam*.

Congress itself may not retroactively tax already completed transactions (*Untermyer* v. *Anderson*, 276 U. S. 440; *Nichols* v. *Coolidge*, 274 U. S. 531; *Helvering* v. *Helmholz*, 296 U. S. 93; *Hudson* v. *United States*, 12 Fed. Supp. 620), and even in the case of the income tax only a limited retroactivity has been attempted by Congress or been upheld by this Court. See *Cooper* v. *United States*, 280 U. S. 409, 412. Moreover, whatever may be said of the power of the Commissioner to amend retroactively his regulations with respect to the basis to be assigned to the new shares (*Cf. United States* v. *Davis*, 132 U. S. 334), it is submitted that the same reasoning will not justify his departure from the express language of Section 204(a). As applied to the old stock, the original regulation was not so contrary to law or so unreasonable that it should not be recognized as a valid regulation. It differs in this vital respect from *Titsworth* v. *Commissioner*, 73 Fed. (2d) 385.

It is respectfully urged upon the foregoing grounds that this petition for a rehearing and opportunity for reargument be granted.

Respectfully submitted,

LAURENCE GRAVES,
Counsel for Petitioners.

February 27, 1936.

Certificate of Counsel.

I, LAURENCE GRAVES, counsel for the above-named MANHATTAN GENERAL EQUIPMENT COMPANY and COLLIER SERVICE CORPORATION, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

LAURENCE GRAVES,
Counsel for Petitioners.